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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 783

ORMAN W. EWING,

Petitioner,

vs.

NATIONAL AIRPORT CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION THAT PETITION BE CONSIDERED ON APPENDICES TO BRIEFS PRINTED FOR THE USE OF THE CIRCUIT COURT OF APPEALS.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
NICHOLAS J. CHIASCIONE,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner respectfully prays for the issuance of a Writ of Certiorari to review the judgment below.

Jurisdiction.

The judgment below was entered November 12, 1940 (R. 62). An extension of time of ten days within which to apply for Certiorari was granted by the Honorable Chief Justice of the United States February 12, 1941, the extension being for ten days from February 12th, 1941 (R. 63).

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347(a).)

Opinion Below.

The opinion below will be found at R. 58. It is reported in 115 F. (2d) 859.

Statement.

Petitioner sued the National Airport Corporation in the District Court for the Eastern District of Virginia on a *quantum meruit* and got a verdict of $8,750.00, which the trial court (Judge Way) set aside on the ground that the work done involved objectionable lobbying. The National Airport Corporation had employed petitioner on a contingent fee basis to get the Government to remove a military road which bi-sected the Washington Airport just across the Potomac River in Virginia. This was to be accomplished either by buying the road from the Government or in any other way possible. Ewing, petitioner, interviewed the War Department which was entirely agreeable and, indeed, anxious to sell the military road. Unfortunately, however, it turned out they could not do it without legislation. The War Department and Ewing, petitioner, thereupon drafted a Bill which was introduced in Congress and which Ewing was instrumental in getting passed. The first Bill was vetoed by the President but another Bill was introduced two sessions later and passed. The President signed it and the road was thereupon sold to the Airport for $25,000. This was completely satisfactory to Respondent and the War Department but Respondent refused to pay Ewing for his work.

Ewing sued on a *quantum meruit* and the jury awarded him $8,750 but, as said above, the trial court set it aside on the ground that Ewing's "lobbying" was against public policy. The Circuit Court of Appeals affirmed on the theory

that Ewing in securing passage of the Bill used personal and political influence. The Court said:

> "As a former member of a national political committee he was in Washington doing lobbying work. He promised certain senators to exert political influence for them in their home states in return for their help in the passage of the legislation he was favoring. He repeatedly admitted this in the letters he wrote and in the testimony he gave in the trial of the case. While the legislation may have been meritorious and while the plaintiff may have done nothing more than return personal favors for help in securing the passage of the bill he was advocating, he may not come into a court and enforce payment for his services before the Congress."

It is conceivable that the Court below might thus refer to Ewing's activities with respect to the *first* Bill which Congress passed but, as said before, the first Bill was vetoed. Ewing was suing for a *quantum meruit,* not for services rendered with respect to the *first* Bill which was vetoed but with respect to the *second* Bill, introduced two sessions later, which was not vetoed but which the President signed and which became law. It cannot be assumed that the jury gave the Petitioner $8,750 for activities in getting a Bill passed that produced nothing. On the contrary the presumption must be that their verdict was for his services in connection with the Bill that finally became law. Counsel in arguing the case to the jury was careful to ask no recovery whatever for plaintiff's services with regard to the first Bill. Likewise the trial Court instructed the jury that the first contract had been terminated upon the veto of the first Bill in September, 1937, and that this was acquiesced in by the plaintiff (R. 30-31). This is important for the reason that the entire record will be searched in vain for any evidence whatever as to any objectionable activities by Ewing in connection with the second Bill. The only testi-

mony relating to what Ewing did with respect to the *second* Bill is found at page 24 of the stenographic transcript on file in this court (R. —) which is as follows:

> "Q. Without going into too much detail, Mr. Ewing, will you generally outline for the jury what your course of work was in connection with that second bill?
>
> A. I did a tremendous amount of work on that, by contacting every member of both the House and Senate that I could reach, regardless of their committee connection. Mr. Solomon had an aerial picture of the airport made, and had it printed on a double page in Life magazine, and he bought, I don't know how many of those magazines. But the write-up, and so forth—the aerial picture, a double page picture,—it just about told its own story of that road going across there. I used that to a great extent to convince Congress—there were only 500 members of Congress—that this thing should be done, as a public duty—to take that road out of there. I used that magazine and contacted these people, and gave them a copy of it and other information. I wrote a great many letters to different congressmen and senators who asked me questions during the conversations, and told me to answer by letter. But we did not work under the high pressure we worked the first time."

In spite of the above the court below made no distinction whatever between Ewing's services with regard to the first Bill which was vetoed and for which he asked no recovery whatsoever, and his services above described on the second Bill which became law and which accomplished what the Airport and the War Department wanted. Even assuming that Ewing's activities with regard to the first Bill consisted of objectionable personal solicitation, (we believe they did not), there is literally no evidence whatever in the record upon which the trial court could deprive plaintiff of his verdict for the work set forth above.

Questions Presented.

Upon the above statement, two serious questions are presented:

(1) Whether the trial court and the court below, with no evidence whatever in the record showing any objectionable activity with regard to the second Bill, can indulge in surmise and go out of its way to set the verdict aside;

(2) Entirely aside from the above, has a Federal Court in a case arising solely by reason of diverse citizenship, the right to impose its own ideas of public policy upon the plaintiff in order to deprive him of a jury's verdict? Is it not the public policy of the State of Virginia which the Federal Court must apply—at least in the absence of a showing of such gross and unconscionable conduct that no court of justice could entertain the case? Lacking such an overwhelming showing, does the failure of the courts below to follow the Virginia law amount to a violation of this Court's ruling in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64?

Reasons for the Allowance of the Writ.

We venture to say that hardly any case can be found wherein a court has gone more out of its way to set aside a verdict of a jury on the basis of surmise and speculation than the present case. There is literally no evidence in the record of any objectionable activities by Ewing to get the second bill passed. It follows that the trial court was entirely unjustified in setting aside the verdict. As the court below approved this the case presents an entire failure to preserve the spirit of Rule 50 of the New Rules of Civil Procedure relative to the court's power to set aside a verdict returned by a jury.

In so doing the court below has certainly departed from the accepted and usual course of judicial proceedings or

sanctioned such a departure on the part of the trial court within the meaning of this Court's Rule 38, Subdivision 5 (b).

Setting aside a verdict on the ground of public policy is judicial legislation unless the public policy is (a) certain and determined, and (b) the case shows a clear violation of it. It certainly cannot be the law that in close or doubtful cases a person's contractual rights (a species of property protected by the Fifth Amendment) can lightly be set aside by a Federal Court because that court may have advanced or even ultra-laudable notions of public policy. The Virginia law is very much opposed to courts setting aside contracts as illegal on the ground of public policy, "unless the case is free from all doubt" (*Aetna Life Ins. Co.* v. *A. C. L. R. Co.* (C. C. A. 4th), 79 F. (2d) 463, 467); *Brown* v. *Stevens*, 61 Va. 296. The Virginia courts have likewise held in *Smyth Bros.* v. *Beresford*, 128 Va. 137, that "an intention to violate the law or morals is not to be presumed." In *Old Dominion Transportation Co.* v. *Hamilton*, 146 Va. 594, the transportation company wanted to cancel a lease with the City of New York. It did what any practical businessman would do, i. e., it employed a New York politician to take the matter up with the City of New York. Had the two courts below been presented with this case they would have made short work of it on the surmise that there must be something deep-dyed and nefarious in employing a man who knew the city officials of New York to get them to cancel the lease. The Virginia courts, however, took no such view and said very sensibly that it was not illegal for the company to get all the help it could from politicians. It likewise held that whether Hamilton had done anything improper in so doing was a question of fact for the jury to determine and in the present case the jury, in effect, determined it.

The Federal cases cited by the court below are all inapplicable due to *Erie R. Co.* v. *Tompkins, supra.* This

Court was careful in *Erie R. Co.* v. *Tompkins*, and the subsequent cases based upon it, to restrain illegal Federal excursions into the domain of State law. We believe the present case presents another such instance, particularly objectionable because it is in the shadowy area of public policy, uncertain and undeclared in the best of cases, and clearly misapplied in the present case.

The policy of the Federal Courts ought to be as announced in *Brown* v. *Gesellschaft*, 70 App. D. C. 94, 104 F. (2d) 227, and reflected in this Court's opinion in *Steele* v. *Drummond*, 275 U. S. 199, 205, to the effect that courts naturally should be reluctant to permit a corporation which has received the benefit of a man's services to hide behind a doctrine of public policy when it comes to paying for them. Particularly is this so in the present case wherein all the plaintiff was doing was to help the War Department to get a Bill through Congress which the War Department itself wanted passed. The Bill was not "favor" legislation, condemned in *Gesellschaft* v. *Brown*, 78 F. (2d) 410. It was not a private act for the relief of respondent—it was a Public Act and entitled as such: "Public No. 481, 75th Congress, Chapter 142—3rd Session."

Conclusion.

The Petition should be granted.

Respectfully submitted,

ORMAN W. EWING,
Petitioner.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
NICHOLAS J. CHIASCIONE,
Bowen Building,
Washington, D. C.,
Attorneys for Petitioner.